COMMONWEALTH of VIRGINIA

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March 22, 2013

The Honorable Robert G. Marshall
Member, House of Delegates
Post Office Box 421
Manassas, Virginia 20108-0421

Dear Delegate Marshall:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether the General Assembly constitutionally may impose an additional 0.7 percent sales tax for certain localities in Northern Virginia and Hampton Roads as well as impose additional recordation and transient occupancy taxes for certain localities in Northern Virginia.[1] You specifically ask whether House Bill 2313's imposition of different tax rates on similar transactions in different areas of the Commonwealth violates Article X, § 1 of the Virginia Constitution. You further inquire whether the taxes imposed are prohibited special laws and/or are subject to the two-thirds voting requirement of Article VII, §§ 1 and 2.

Response

It is my opinion that, although the imposition of different taxes on transactions in different localities does not violate Article X, § 1, HB 2313's imposition of taxes in the specific localities constitutes a local law related to taxation prohibited by Article IV, § 14(5) of the Virginia Constitution. It further is my opinion that, because the taxes were imposed directly by the General Assembly, the taxes cannot be saved by the provisions of Article VII, § 2, even if they had obtained the affirmative vote of two-thirds of the members elected to each house.

Applicable Law and Discussion

In the 2013 session, the General Assembly passed House Bill 2313 ("HB 2313"). HB 2313 has many constituent pieces. Most relevant to your inquiry is that, in addition to raising certain taxes for the Commonwealth as a whole, it raises those taxes by additional amounts in certain localities. Specifically, it imposes the following additional taxes in certain localities:

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[1] You do not inquire about the additional use taxes imposed by the new § 58.1-604.1. Accordingly, they are not addressed in this opinion.

(1) "in each county and city embraced by the Northern Virginia Transportation Authority[2] . . . a retail sales tax at the rate of 0.70 percent . . ." (new § 58.1-603.1(A));

(2) "in each county and city embraced in the Hampton Roads Region,[3] as described in subsection B of § 33.1-23.5:3, a retail sales tax rate of 0.70 percent. . . ." (new § 58.1-603.1(B));

(3) a "'regional congestion relief fee' . . . on each deed, instrument, or writing by which lands, tenements, or other realty located in any county or city embraced by the Northern Virginia Transportation Authority . . . is sold and is granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser or any other person, by such purchaser's direction. . . ." (new § 58.1-802.2)[4]; and

(4) "an additional transient occupancy tax at the rate of three percent of the amount of the charge for the occupancy of any room or space occupied that is located in any county or city embraced by the Northern Virginia Transportation Authority . . ." (new § 58.1-1742).

You inquire whether the imposition of each of these taxes violate the Constitution. The inquiry takes three parts: first, whether the additional taxes in certain localities violate the uniformity requirement of Article X, § 1, second, whether the taxes violate the constitutional prohibition on the General Assembly enacting "any local, special, or private law . . . [f]or the assessment and collection of taxes, except as to animals which the General Assembly may deem dangerous to the farming interests"[5] and third, assuming that the taxes do constitute a local law in violation of Article IV, § 14(5), whether the General Assembly has the authority to impose local taxes pursuant to Article VII, § 2 should two-thirds of the members elected to each house vote for the taxes.

I first note that any analysis regarding the constitutionality of an enactment begins with the recognition that the General Assembly does not operate under a grant of authority, but rather, that it has all powers except those prohibited by either the Virginia or United States Constitutions.[6] Enactments of the General Assembly are presumed to be constitutional, and the Virginia Supreme Court "will not

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[2] The Northern Virginia Transportation Authority is made up of the counties of Arlington, Fairfax, Loudoun, and Prince William, and the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park. VA. CODE ANN. § 15.2-4831 (2012).

[3] Pursuant to the new § 33.1-23.5:3, which is part of HB 2313, the localities composing the Hampton Roads Region are the counties of Gloucester, Isle of Wight, James City, and York and the Cities of Chesapeake, Hampton, Newport News, Norfolk, Poquoson, Portsmouth, Suffolk, Virginia Beach, and Williamsburg.

[4] There is no question that, despite the name given it by the General Assembly, the "regional congestion relief fee" is a tax for the purposes of the Virginia Constitution. The General Assembly enacted a similar levy, also dubbed a "regional congestion relief fee," when it passed Chapter 896 of the Acts of Assembly in 2007. In striking the levy down as an unconstitutional delegation of the General Assembly's taxing power, the Virginia Supreme Court held that the regional congestion fee and other levies in Chapter 896 "constitute[] a tax, because they all are designed to produce revenue to be used for the purpose of financing bonds and **supplying revenue for transportation purposes in the Northern Virginia localities**." Marshall v. N. Va. Transp. Auth., 275 Va. 419, 431-32, 657 S.E.2d 71, 78 (2008) (emphasis added).

[5] VA. CONST. art. IV, § 14(5).

[6] VA. CONST. art. IV, § 14 ("The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted."); Harrison v. Day, 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959) (The Virginia Constitution "is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.").

invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions."[7] The Supreme Court will "give the Constitution [of Virginia] a liberal construction in order to sustain the enactment in question, if practicable[,]"[8] and "every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity."[9]

While the General Assembly's powers are broad, they are not unlimited. "An act is unconstitutional if it is expressly prohibited or is prohibited by necessary implication based upon the provisions of the Constitution of Virginia or the United States Constitution."[10] I further note that the Virginia Constitution, taken as a whole, treats the taxing power differently than other powers exercised by the General Assembly, imposing numerous restrictions on the taxing power and evincing a healthy concern about its potential abuse. As the Virginia Supreme Court has noted, the Virginia Constitution's "explicit language demonstrates the special status that the legislative taxing power occupies in the Constitution, and reflects the greater restrictions that the Constitution places on the General Assembly's exercise of the taxing power."[11] The Court further has expressed that "the people of Virginia approved a Constitution that places restrictions on the General Assembly's exercise of the taxing power. In fact, greater restrictions are placed on the taxing power than are placed on the exercise of most other types of legislative power."[12]

One such restriction is found in Article X, § 1, which provides, with its title, as follows:

> **Section 1. Taxable property; uniformity; classification and segregation.**
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> All property, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except that the General Assembly may provide for differences in the rate of taxation to be imposed upon real estate by a city or town within all or parts of areas added to its territorial limits, or by a new unit of

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[7] *Marshall*, 275 Va. at 427, 657 S.E.2d at 75 (citing In re Phillips, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); City Council of Emporia v. Newsome, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984)).

[8] *Id.* at 428, 657 S.E.2d at 75 (citing Heublein, Inc. v. Dep't of Alcoholic Beverage Control, 237 Va. 192, 195, 376 S.E.2d 77, 78 (1989)).

[9] *Id.* (citing Hess v. Snyder Hunt Corp., 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990)). *See* Blue Cross of Va. v. Commonwealth, 221 Va. 349, 358-59, 269 S.E.2d 827, 832-33 (1980); *In re Phillips*, 265 Va. at 85-86, 574 S.E.2d at 272.

[10] *Marshall*, 275 Va. at 428, 657 S.E.2d at 75-76 (citing Dean v. Paolicelli, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952); Kirkpatrick v. Bd. of Supvrs., 146 Va. 113, 126, 136 S.E. 186, 190 (1926); Albemarle Oil & Gas Co. v. Morris, 138 Va. 1, 7, 121 S.E. 60, 61 (1924); Button v. State Corp. Comm'n, 105 Va. 634, 636, 54 S.E. 769, 769 (1906); Smith v. Commonwealth, 75 Va. (1 Matt.) 904, 907 (1880); Sch. Bd. v. Shockley, 160 Va. 405, 413, 168 S.E. 419, 422 (1933)).

[11] *Id.* at 432-33, 657 S.E.2d at 78.

[12] *Id.* at 434, 657 S.E.2d at 79. These constitutional restrictions include: Article I, § 6 (that Virginians "cannot be taxed . . . without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good."); Article IV, § 11 ("No bill . . . which imposes, continues, or revives a tax, shall be passed except by the affirmative vote of a majority of all the members elected to each house, the name of each member voting and how he voted to be recorded in the journal."); Article IV, § 14(5); and Article VII, § 2 ("The General Assembly may also provide by special act for the organization, government, and powers of any county, city, town, or regional government, including such powers of legislation, taxation, and assessment . . ." with "special act" being defined by Article VII, § 1 as requiring an affirmative vote of two-thirds of the members elected to each house of the General Assembly.")

> general government, within its area, created by or encompassing two or more, or parts of two or more, existing units of general government. Such differences in the rate of taxation shall bear a reasonable relationship to differences between nonrevenue-producing governmental services giving land urban character which are furnished in one or several areas in contrast to the services furnished in other areas of such unit of government.
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> The General Assembly may by general law and within such restrictions and upon such conditions as may be prescribed authorize the governing body of any county, city, town or regional government to provide for differences in the rate of taxation imposed upon tangible personal property owned by persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law who are deemed by the General Assembly to be bearing an extraordinary tax burden on said tangible personal property in relation to their income and financial worth.
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> The General Assembly may define and classify taxable subjects. Except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes, may be levied.

With respect to Article X, § 1 and its predecessors, the Supreme Court has held that "[t]he dominant purpose of [this constitutional provision] is to distribute the burden of taxation, so far as is practical, evenly and equitably."[13] Nonetheless, before a particular tax can be invalidated under Article X, § 1, that tax must be subject to the constitutional provision. Thus, the inquiry turns on whether Article X, §1 applies to the taxes about which you have inquired.

From the express terms of Article X, § 1, it is evident that it is focused on property taxes. From the title of the section ("Taxable property") through the remainder of the section, there are numerous references to the taxation of property. Contextually, it appears that the Article X, § 1's uniformity requirement applies only to taxes on property, whether real or personal. Moreover, the Supreme Court of Virginia consistently has held that the uniformity provision of Article X, § 1 and its predecessors apply only to direct taxes on property.[14]

None of the taxes about which you inquire are taxes on property, but rather, they are taxes on transactions (sales, stays at hotels, etc.). Even the "regional congestion fee" found in the new § 58.1-802.2 is not a tax on property, but rather, is a tax on transactions because it applies upon the recordation of "each deed, instrument, or writing by which lands, tenements, or other realty located in any county or city embraced by the Northern Virginia Transportation Authority . . . [that] is sold and is granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser or any other person, by such purchaser's direction. . . ." Accordingly, I conclude that none of the taxes about which you inquire offend Article X, § 1.

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[13] Alderson v. Cnty. of Alleghany, 266 Va. 333, 339, 585 S.E.2d 795, 798 (2003) (internal quotation marks and citations omitted).

[14] *See, e.g.*, Tidewater Ass'n of Homebuilders, Inc. v. City of Virginia Beach, 241 Va. 114, 121, 400 S.E.2d 523, 527 (1991) ("[T]he provisions of Article X, § 1 apply to taxation of property."); Cnty. Bd. v. Foglio, 215 Va. 110, 112, 205 S.E.2d 390, 392 (1974); Shepheard v. Moore, 207 Va. 498, 502, 151 S.E.2d 419, 422 (1966); Bradley & Co. v. City of Richmond, 110 Va. 521, 525, 66 S.E. 872, 874 (1910) (citing *Helfrick's Case*, 70 Va. 844, 29 Gratt. 844 1878)); *see also* II A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1040 (1974).

Irrespective of Article X, § 1, the Supreme Court of Virginia has made clear, based on the express terms of Article IV, § 14(5), that "[t]he General Assembly is directly prohibited from enacting 'any local, special, or private law . . . [f]or the assessment and collection of taxes.'"[15] Furthermore, having enumerated specific categories for which the General Assembly may not enact special or local laws, the Virginia Constitution, in the very next section, provides that "[i]n all cases enumerated in the preceding section, and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws."[16]

The prohibition on special or local laws and the directive that the General Assembly enact general laws has been part of the Virginia Constitution since 1902.[17] Since that time, it generally has been understood that, "'[t]aken together, the pervading philosophy of Article IV, sections 14 and 15 reflects an effort to avoid favoritism, discrimination, and inequalities in the application of the laws.'"[18] "Although all legislative enactments are entitled to a presumption of constitutionality, [the Virginia Supreme Court has] not hesitated to invalidate laws found, upon careful consideration, to violate the prohibitions against special laws."[19] Because the local taxes in HB 2313 discriminate against certain localities, they run contrary to Article IV, §§ 14 and 15.

Nonetheless, the special and local law prohibition of Article IV, § 14 does not prohibit the General Assembly from drawing distinctions or from creating classifications.[20] The reasonableness of and necessity for a classification are primarily issues for a legislature, and, "'if any state of facts can be reasonably conceived that would sustain [the classification], that state of facts at the time the law was enacted must be assumed.'"[21]

Furthermore, when, as here, the General Assembly uses the boundaries of localities as the basis for its classification, the classification, while potentially permissible, must survive additional scrutiny. Specifically,

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[15] *Marshall*, 275 Va. at 434, 657 S.E.2d at 79 (quoting VA. CONST. art IV, § 14(5)).

[16] VA. CONST. art. IV, § 15.

[17] Benderson Dev. Co. v. Sciortino, 236 Va. 136, 147, 372 S.E.2d 751, 757 (1988).

[18] *Id.* (quoting I A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 549 (1974) (citing Martin's Ex'rs v. Commonwealth, 126 Va. 603, 611-12, 102 S.E. 77, 81 (1920); Winfree v. Riverside Cotton Mills, 113 Va. 717, 722, 75 S.E. 309, 311 (1912)).

[19] *Benderson*, 236 Va. at 148, 372 S.E.2d at 757 (citing Riddleberger v. Chesapeake Ry., 229 Va. 213, 327 S.E.2d 663 (1985); Commonwealth v. Hines, 221 Va. 626, 272 S.E.2d 210 (1980); Green v. Cnty. Bd., 193 Va. 284, 68 S.E.2d 516 (1952); Cnty. Bd. of Supvrs. v. Am. Trailer Co., 193 Va. 72, 68 S.E.2d 115 (1951); Shulman Co. v. Sawyer, 167 Va. 386, 189 S.E. 344 (1937); Quesinberry v. Hull, 159 Va. 270, 165 S.E. 382 (1932); McClintock v. Richlands Corp., 152 Va. 1, 145 S.E. 425 (1928); Shelton v. Sydnor, 126 Va. 625, 102 S.E. 83 (1920)).

[20] *Am. Trailer Co.*, 193 Va. at 78-79, 68 S.E.2d at 120.

[21] Concerned Residents v. Bd. of Supvrs., 248 Va. 488, 498, 449 S.E.2d. 787, 793 (1994) (quoting *Martin's Ex'rs*, 126 Va. at 612-13, 102 S.E. at 80). Despite a similarity in language used by the courts, analysis of the special and local laws provision of the Virginia Constitution is not the same as the rational basis test employed when analyzing Equal Protection claims pursuant to the U.S. Constitution. As the Virginia Supreme Court has noted:

> It is true that for a long period of our history, the Equal Protection clause was interpreted by both federal and state courts in language that bore marked similarities to the analysis we made of statutes under the special-laws prohibition contained in the Virginia Constitution. But the two are not the same.

Benderson, 236 Va. at 146, 372 S.E.2d at 756.

> " . . . the fact that a law applies only to certain territorial districts does not render it unconstitutional, provided it applies to all districts and all persons who are similarly situated, and to all parts of the State where like conditions exist. Laws may be said to apply to a class only, and that class may be in point of fact a small one, provided the classification itself be a reasonable and not an arbitrary one, and the law be made to apply to all of the persons belonging to the class without distinction."[22]

As noted above, the various levies at issue are clearly taxes,[23] and therefore, there can be no question that HB 2313 is a law regarding the "assessment and collection of taxes."[24] Thus, the first portion of your inquiry turns on whether the General Assembly logically could conclude that all of the localities identified for additional taxation in the enactment have the same transportation issues and that none of the localities that are not identified for additional taxation have similar transportation issues. Thus, for the enactment to survive scrutiny, it must be reasonable to conclude that Isle of Wight County and the City of Poquoson have transportation issues that are the same as the City of Virginia Beach (and the others in the Hampton Roads Region), but unlike any other locality in the Commonwealth.[25] It also would have to be reasonable to conclude that Prince William County's transportation issues are more similar to the problems of Arlington County and the City of Alexandria than they are to Stafford County. Finally, it would have to be reasonable to conclude that no locality located outside of the area embraced by the Northern Virginia Transportation Authority or the Hampton Roads Region has transportation issues substantially similar to at least one of the localities contained in those groupings.

Given the inherent differences in the localities that make up the two groupings and the similarities that some of the localities necessarily share with localities outside of the groupings, it is unlikely that the classification here passes constitutional muster.[26]

A conclusion that the local taxes found in HB 2313 violate Article IV, § 14(5)'s prohibition on local laws does not end the inquiry. As the Supreme Court has stated,

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[22] *Green*, 193 Va. at 287-88, 68 S.E.2d at 518 (quoting *Ex parte Settle,* 114 Va. 715, 718-9, 77 S.E. 496, 497 (1913)).

[23] *Marshall*, 275 Va. at 431-32, 657 S.E.2d at 78 ("[E]ach of the regional taxes and fees provided in Chapter 896 [of the Acts of Assembly of 2007] constitutes a tax, because they all are designed to produce revenue to be used for the purpose of financing bonds and supplying revenue for transportation purposes in the Northern Virginia localities.").

[24] VA. CONST. art. IV, § 14(5).

[25] By its own terms, HB 2313 necessarily suggests that at least some of the localities embraced by the Northern Virginia Transportation Authority are dissimilar to the localities in the Hampton Roads Region because the regional congestion fee and additional transient occupancy tax are only applicable in the localities embraced by the Northern Virginia Transportation Authority.

[26] In *Marshall*, none of the parties challenging the enactment, which contained similar local taxes, raised the issue of the taxes violating the constitutional prohibition on special/local laws. Yet the Court raised the issue *sua sponte*, noting in the opinion that

> [t]he Marshall Defendants and Loudoun County did not argue before the circuit court that Chapter 896 is a local or special law that violates the provisions of Article IV, Section 14(5), prohibiting the General Assembly from enacting any local, special, or private law for the assessment and collection of taxes. Thus, the question whether Chapter 896 is such a local or special law . . . is not before us in these appeals.

275 Va. at 435 n.3, 657 S.E.2d at 79 n.3. Although the Court did not address the question because the parties did not raise it, the fact that the Court noted the question at all is clearly significant.

> [t]he General Assembly is directly prohibited from enacting "any local, special, or private law . . . [f]or the assessment and collection of taxes." Va. Const. art. IV, § 14(5). There is, however, an exception to this specific prohibition. The General Assembly may by special act delegate the power of taxation to any county, city, town, or regional government. *See* Va. Const. art. VII, § 2. NVTA is not a county, city, town, or regional government, and thus it is not a political subdivision to which the General Assembly may constitutionally delegate its legislative taxing authority pursuant to Article VII, Section 2.[27]

Regarding the seeming conflict between Article IV, § 14(5) and Article VII, § 2, the Court has consistently held that "[w]hen an act of assembly involves 'the organization, government, and powers of any county, city, town or regional government, including such powers of legislation, taxation, and assessment' the authorization found in Art. VII, §§ 1 and 2 prevails over the restrictions found in Art. IV, § 14."[28] Thus, if the local taxes imposed by HB 2313 were to fall within Article VII, § 2, they will survive despite the restrictions found in Article IV, § 14(5).

The local taxes contained in HB 2313 do not fall within the ambit of Article VII, § 2. Article VII, § 2 expressly deals with the General Assembly's ability to confer powers of taxation **to** local governments. It does not authorize the General Assembly to impose special local taxes **on** the citizens of specific localities.[29] Accordingly, the two-thirds requirement you inquire about is not applicable here.

Given the foregoing, it is my opinion that the additional local taxes imposed by HB 2313 violate the Virginia Constitution.[30] In reaching this conclusion, I make no judgment on the wisdom of the policy decisions underlying the local tax provisions of HB 2313. My opinion is limited to the means the General Assembly chose to achieve its objectives. These particular means violate the Virginia Constitution, and therefore, other means to address this aspect of Virginia's transportation challenges must be used.

I do not conclude that the General Assembly cannot address the problem, but rather, only that constitutional means must be employed. For example, the General Assembly could, pursuant to Article VII, § 2, grant governing bodies of localities the power to impose the local taxes that the General Assembly cannot. Alternatively, the General Assembly could adopt a classification scheme that encompassed only localities meeting certain objective criteria (and additional localities that might meet the criteria in the future), thereby guaranteeing that the affected localities were, in fact, substantially similar and that no localities similarly affected were excluded. Under existing precedent, such an

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[27] *Id.* at 434, 657 S.E.2d at 79.

[28] *Alderson*, 266 Va. at 341, 585 S.E.2d at 799.

[29] *See, e.g., Marshall*, 275 Va. at 434, 657 S.E. 2d at 79 (Pursuant to Article VII, § 2, "[t]he General Assembly may by special act **delegate the power of taxation to** any county, city, town, or regional government." (emphasis added)); *Alderson*, 266 Va. at 342, 585 S.E.2d at 799 (Article VII, § 2 enactment in question did "not determine assessments nor [did] it establish tax rates.").

[30] This does not mean that all of HB 2313 is necessarily unconstitutional. "The General Assembly expressly has provided that any unconstitutional provisions of an enactment will be severed from its remaining valid provisions, unless the enactment specifically states that its provisions may not be severed or that the provisions must operate in accord with one another." *Marshall*, 275 Va. at 428, 657 S.E. 2d at 76 (citing VA. CODE ANN. § 1-243). *See also* H.B. 2313, Para. 16, 2013 Reg. Sess. (Va. 2013) ("That should any portion of this act be held unconstitutional by a court of competent jurisdiction, the remaining portions of this act shall remain in effect."). Accordingly, given the limits of your inquiry, my opinion is confined only to those provisions of HB 2313 that impose/appropriate the local taxes. Any further analysis would be beyond the scope of this opinion.

approach would not violate Article IV, § 14(5), and therefore, could be enacted if it received majority support from the members elected to each house.

Whether these or other ideas are the correct policy prescriptions is ultimately for the General Assembly to decide. However, whatever means is chosen must comport with the Virginia Constitution.

Conclusion

Accordingly, it is my opinion that, although the imposition of different taxes on transactions in different localities does not violate Article X, § 1, HB 2313's imposition of taxes in the specific localities constitutes a local law related to taxation prohibited by Article IV, § 14(5) of the Virginia Constitution. It further is my opinion that, because the taxes were imposed directly by the General Assembly, the taxes cannot be saved by the provisions of Article VII, § 2, even if they had obtained the affirmative vote of two-thirds of the members elected to each house.

With kindest regards, I am

Very truly yours,

Kenneth T. Cuccinelli, II
Attorney General